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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

FELIX RAMIREZ RUIZ,

Defendant and Appellant.

B205855

(Los Angeles County
Super. Ct. No. KA080927)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tia Fisher, Judge. Remanded for resentencing.

Catherine Campbell, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Keith H. Borjon, Supervising Deputy Attorney General, John R. Gorey, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Felix Ramirez Ruiz (defendant) pleaded guilty to three counts of second degree robbery (Pen. Code, § 211¹) and one count of child abuse (§ 273a, subd. (a)). Defendant admitted that he personally used a deadly and dangerous weapon in the commission of the robberies (§ 12022, subd. (b)(1)); that he suffered a prior felony conviction alleged to be a serious felony within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)) and section 667, subdivision (a); and that he suffered four prior convictions for which he allegedly served separate prison terms within the meaning of section 667.5, subdivision (b). The trial court sentenced defendant to state prison for a term of 21 years, eight months as follows: a term of 10 years for one of defendant's robbery convictions – the upper term of five years doubled to 10 years under the Three Strikes law (the trial court imposed concurrent terms for defendant's two additional robbery convictions); a consecutive term of two years, eight months for defendant's child abuse conviction (one-third of the middle term of four years doubled under the Three Strikes law); a consecutive one-year term for defendant's personal use of a deadly or dangerous weapon (§ 12022, subd. (b)(1)); a consecutive term of five years for defendant's prior serious felony conviction under section 667, subdivision (a)(1); and three consecutive terms of one year for three of defendant's four prior convictions and prison terms under section 667.5, subdivision (b). The trial court stayed imposition of the one-year term for defendant's fourth prior qualifying conviction under section 667.5, subdivision (b) because that same conviction served as the basis for the five-year term under section 667, subdivision (a)(1).

On appeal, defendant contends that the trial court erred in imposing (or staying) any of the four terms under section 667.5, subdivision (b) because they are not supported by sufficient evidence. Alternatively, defendant contends that the trial court mistakenly believed that it was without discretion to strike the one-year terms under section 667.5,

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All statutory citations are to the Penal Code unless otherwise noted.

subdivision (b). Finally, defendant contends that the trial court was required to strike, rather than stay, the one year term under section 667.5, subdivision (b) that also served as the basis for the five-year term under section 667, subdivision (a)(1). We asked the parties to submit supplemental briefing addressing the issues of whether sufficient evidence supports defendant's admission of the prior felony conviction alleged as a serious or violent felony under the Three Strikes law or as a serious felony under section 667, subdivision (a)(1), the remedy if such evidence is insufficient, and whether the trial court erred in sentencing defendant to concurrent terms of one-third of the middle term for two of his three robbery convictions. We remand for resentencing.

BACKGROUND²

After the jury was selected, defense counsel informed the trial court that defendant wanted to accept the prosecution's apparent offer of 13 years. The trial court stated that at that point, defendant's only option would be to plead open to all charges. The prosecutor confirmed that the People had withdrawn their offer and the trial court stated that it would not engage in negotiations. Defendant's only option was to plead guilty to everything – the three counts of robbery with the personal use of a deadly or dangerous weapon enhancement and the child abuse count. Defendant also would have to admit the prior felony conviction for violating section 246.3 in case number KA005390 that was alleged as a strike under the Three Strikes law and as a serious felony under section 667, subdivision (a)(1), and the four “different state prison priors” alleged under section 667.5, subdivision (b). In clarifying the nature of the violation of section 246.3, the trial court asked the prosecutor if that offense was shooting at a dwelling. The prosecutor stated that he believed it was.

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Because the issues addressed in this appeal concern defendant's sentence only, we dispense with a recitation of the facts underlying his convictions. Instead, we set forth the factual background of defendant's plea and sentencing that forms the foundation for the issues on appeal.

The trial court stated to defendant that his maximum potential sentence was 28 years in state prison if he pleaded guilty to all charges and admitted all of the prior conviction allegations. The trial court informed defendant that the prosecution would not dismiss any of the charges or strike any of the prior conviction allegations and that it would not engage in any plea negotiation. Defendant, who was assisted by an interpreter, stated that he understood the trial court's advisement and wanted to enter a plea.

The prosecutor advised defendant that he was charged with three counts of robbery in violation of section 211 and one count of child abuse in violation of section 273a, subdivision (a). The prosecutor further advised defendant that it was alleged that he personally used a deadly or dangerous weapon in violation of section 12022, subdivision (b)(1); that he suffered a serious or violent felony pursuant to section 667, subdivision (a) and 1170.12, subdivision (a); and "on four separate occasions pursuant to Penal Code section 667.5(b) that [defendant] went to state prison four times." Defendant stated that he understood the charges and allegations and wanted to plead guilty to all of the charges.

Defendant stated that he had reviewed the felony advisement of rights, waiver, and plea form with his attorney. Defendant stated that he had not read the plea form, but that the interpreter had read the form to him. The trial court asked the interpreter if she had read the plea form to defendant in its entirety. The interpreter said that she had not, she had only interpreted what defense counsel advised defendant. Defendant stated that he initialed the boxes on all four pages of the plea form and signed the last page. Defendant stated that defense counsel had reviewed with him his Constitutional rights as presented on the plea form, that he understood those rights, and that he was waiving those rights for purposes of his plea.

The trial court then stopped the proceedings. The trial court stated that the interpreter had filed a statement under oath that she had translated the plea form to defendant "and that's part of this issue that has just arisen." The trial court stated that the plea form had to be translated to defendant, and not just what defense counsel said to

defendant. The trial court stated that the interpreter was to translate the plea form before the proceedings continued.

When the proceedings continued, the trial court asked the prosecutor to start over. The prosecutor then advised defendant that he had been charged in a four-count felony complaint with three counts of robbery under section 211. The prosecutor did not advise defendant as to the child abuse charge under section 273a, subdivision (a). The prosecutor further advised defendant that it was alleged that he personally used a deadly and dangerous weapon under section 12022, subdivision (b)(1), that he suffered prior convictions (of an unspecified number) under section 667.5, subdivision (b), and that he suffered a prior serious or violent felony conviction within the meaning of section 667, subdivision (a)(1) and section 1170.12, subdivisions (a) through (d). Defendant stated that he understood “all of the charges and allegations” against him and that he wished to enter an open plea. Defendant understood that by so pleading, he faced a maximum term of imprisonment of 28 years.

Defendant stated that the interpreter had translated the entire felony advisement of rights, waiver, and plea form to him. The plea form states that defendant was entering an open plea to the trial court and sets forth the maximum sentence defendant could receive based on the charged offenses and alleged enhancements. The plea form states that defendant could receive 12 years for the child abuse offense in violation of section 273a, subdivision (a) (the upper term of six years doubled under the Three Strike law); six years for the three robbery offenses (one-third of the middle term of three years doubled under the Three Strikes law); one year for the section 12022, subdivision (b)(1) allegation; five years for the section 667, subdivision (a)(1) allegation; and four years for the section 667.5, subdivision (b) allegations (this part of the form advised that four “priors” were alleged).

Defendant stated that he understood “everything” on the plea form, that he initialed the boxes on the form, and that he signed the last page. Defendant stated that defense counsel had explained defendant’s Constitutional rights as set forth on the form. Defendant waived his Constitutional rights for purposes of his plea. The plea form was

filled out as described by defendant. The plea form states that defendant was pleading guilty to the charges listed on the form and admitting the prior convictions and special allegations and enhancements listed on the form.

Thereafter, the prosecutor took defendant's plea. Defendant pleaded guilty to three counts of robbery (§ 211) and one count of child abuse (§ 273a, subd. (a)) and admitted personally using a deadly or dangerous weapon (§ 12022, subd. (b)(1)).³ As to the prior conviction allegations, the prosecutor and defendant engaged in the following exchange:

“[Prosecutor]: And to the special allegation, sir, pursuant to Penal Code section 667(a)(1) you violated Penal Code section – that you were convicted on or about November 15th, 1990, in case number KA005390, a violation of Penal Code section 246.3, do you admit or deny that allegation, sir?

“[Defendant]: Yes. Yes, I admit it.

“[Prosecutor]: And, sir, pursuant to 1170.12(a) through (d) alleging that on or about November 15th, 1990, same case, case number KA005390, a violation of Penal Code section 246.3, do you admit or deny that allegation?

“[Defendant]: Admit it.

“[Prosecutor]: And to the allegations pursuant to Penal Code section 667.5(b), a violation of Penal Code section – same case, 246.3 in case KA005390; and also in case number KA023067 conviction date of September 19th, 1994, a violation of Penal Code section 12021(a)(1); in case number KA053615 conviction date of September 12th, 2001, a violation of Penal Code section 487(a); and finally case KA068105 conviction date of February 7, 2005, a violation of Penal Code section 666. All those charges are listed as

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The personal use of a deadly or dangerous weapon was alleged as to the three robbery offenses and not as to the child abuse offense. Defendant simply admitted that he personally used a deadly or dangerous weapon without tying that admission to any particular offense. Defendant does not raise any issue with respect to this less-than-precise admission.

allegations pursuant to Penal Code section 667.5(b). [¶] Do you admit or deny that you sustained those prior convictions, sir?

“[Defendant]: Admit it.”

Defense counsel joined in the plea and waivers and stipulated to a factual basis for the plea. The trial court accepted defendant’s plea, finding, among other things, that the charges and allegations are true and that there is a factual basis for the plea and admissions. The trial court stated that defendant was convicted based upon his plea and set defendant’s case for sentencing.

At sentencing, the trial court stated that it wanted to “cover a few bases.” The trial court and counsel for the parties then engaged in the following discussion:

“[Trial court]: I’m looking at the 246.3 which is alleged as the prior pursuant to 667(a) as well as the strike sections 1170.12(a) through (d). I want to just look at that a little more carefully to ensure that the record is accurate. That’s the discharging of firearm in a grossly negligent manner. We talked about that somewhat informally when he was entering his admission to the priors and I seem to recall both of you or one of you making a reference to shooting at a vehicle or shooting out of a vehicle. But that’s actually a gross negligent discharge section.

“[Defense counsel]: I believe so. I don’t recall the reference –

“[Prosecutor]: That’s how it’s referenced. I have the prison commitment papers.

“[Trial court]: Okay, just making sure T’s are crossed, I’s dotted. That then for purposes of the strike law and for purposes of the 667(a) five-year prior, 667(a) refers us to the definition of serious felony. And is that under 23 any felony in which the defendant personally used a dangerous or deadly weapon? Is that the theory?

“[Prosecutor]: That’s the theory of the strike, your Honor.

“[Trial court]: Understood. I know he admitted it and I found a factual basis, but I do recall there being some reference on it that it was a discharge perhaps at a vehicle or a house. I recall there might have been some record made to that extent but I really want to clean up the record at this point. [¶] And 1170.12(a) through (d) incorporates the same subdivision. So I just wanted to ensure that the record reflected that I understood

what the nature of that prior was, that he admitted it, and so he's looking at this as a second strike case as well as a five-year prior."

In sentencing defendant, the trial court selected one of defendant's three second degree robbery convictions as the principal term. For that offense, the trial court imposed the upper of five years (§ 213, subd. (a)(2)) doubled to 10 years under the Three Strikes law. For each of defendant's two remaining second degree robbery convictions, the trial court apparently imposed a concurrent two-year term consisting of one-third of the middle term of three years (§ 213, subd. (a)(2)) doubled under the Three Strikes law. The trial court imposed a consecutive term of two years, eight months for defendant's child abuse conviction consisting of one-third of the middle term of four years (§ 273a, subd. (a)) doubled under the Three Strikes law. The trial court imposed a consecutive one-year term for defendant's personal use of a deadly or dangerous weapon (§ 12022, subd. (b)(1)).

As to defendant's prior conviction admissions, the trial court imposed a consecutive term of five years for defendant's prior serious felony conviction under section 667, subdivision (a)(1). The trial court imposed and stayed, purportedly under section 654, the one-year prison term under section 667.5, subdivision (b) that was based on the same prior conviction (case number KA005390) that served as the basis for the five-year prison term under section 667, subdivision (a)(1). As for the remaining one-year prison terms under section 667.5, subdivision (b), the trial court stated, "The court is required to impose the other three priors under section 667.5(b)."

DISCUSSION

I. There Is Sufficient Evidence In The Record That Defendant's Prior Section 246.3 Conviction Was A Serious Or Violent Felony

The prior conviction alleged as a serious felony under section 667, subdivision (a)(1) and as a serious or violent felony under the Three Strikes law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)) was defendant's 1990 conviction for discharging a firearm in a grossly negligent manner in violation of section 246.3 (case number KA005390). We

asked the parties to submit supplemental briefing addressing the issues of whether sufficient evidence supports defendant's admission of the prior felony conviction as a serious or violent felony under the Three Strikes law or as a serious felony under section 667, subdivision (a)(1) and the proper remedy if the evidence is insufficient.

A. Background

In connection with defendant's plea, the prosecutor and defendant engaged in the following exchange also quoted above:

“[Prosecutor]: And to the special allegation, sir, pursuant to Penal Code section 667(a)(1) you violated Penal Code section – that you were convicted on or about November 15th, 1990, in case number KA005390, a violation of Penal Code section 246.3, do you admit or deny that allegation, sir?

“[Defendant]: Yes. Yes, I admit it.

“[Prosecutor]: And, sir, pursuant to 1170.12(a) through (d) alleging that on or about November 15th, 1990, same case, case number KA005390, a violation of Penal Code section 246.3, do you admit or deny that allegation?

“[Defendant]: Admit it.”

At defendant's sentencing, the trial court and counsel for the parties engaged in the following discussion:

“[Trial court]: I'm looking at the 246.3 which is alleged as the prior pursuant to 667(a) as well as the strike sections 1170.12(a) through (d). I want to just look at that a little more carefully to ensure that the record is accurate. That's the discharging of firearm in a grossly negligent manner. We talked about that somewhat informally when he was entering his admission to the priors and I seem to recall both of you or one of you making a reference to shooting at a vehicle or shooting out of a vehicle. But that's actually a gross negligent discharge section.

“[Defense counsel]: I believe so. I don't recall the reference –

“[Prosecutor]: That's how it's referenced. I have the prison commitment papers.

“[Trial court]: Okay, just making sure T’s are crossed, I’s dotted. That then for purposes of the strike law and for purposes of the 667(a) five-year prior, 667(a) refers us to the definition of serious felony. And is that under 23 any felony in which the defendant personally used a dangerous or deadly weapon? Is that the theory?

“[Prosecutor]: That’s the theory of the strike, your Honor.

“[Trial court]: Understood. I know he admitted it and I found a factual basis, but I do recall there being some reference on it that it was a discharge perhaps at a vehicle or a house. I recall there might have been some record made to that extent but I really want to clean up the record at this point. [¶] And 1170.12(a) through (d) incorporates the same subdivision. So I just wanted to ensure that the record reflected that I understood what the nature of that prior was, that he admitted it, and so he’s looking at this as a second strike case as well as a five-year prior.”

B. Standard of Review

“In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” ([*People v.*] *Rowland* [(1992)] 4 Cal.4th [238,] 269, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L.Ed.2d 560, 99 S.Ct. 2781].) We apply an identical standard under the California Constitution. (*Ibid.*) ‘In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court “must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”’ (*People v. Johnson* (1980) 26 Cal.3d 557, 576 [162 Cal.Rptr. 431, 606 P.2d 738].)” (*People v. Young* (2005) 34 Cal.4th 1149, 1175.)

C. *Application of Relevant Legal Principles*

Section 246.3, subdivision (a) provides, “Except as otherwise authorized by law, any person who willfully discharges a firearm in a grossly negligent manner which could result in injury or death to a person is guilty of a public offense and shall be punished by imprisonment in a county jail not exceeding one year, or by imprisonment in the state prison.” The violation of section 246.3 is not necessarily a serious felony enumerated in section 1192.7, subdivision (c) or a violent felony enumerated in section 667.5, subdivision (c). A violation of section 246.3 qualifies as a serious felony if the defendant personally used a firearm in the commission of the offense within the meaning of section 1192.7, subdivision (c)(8) (“any felony in which the defendant personally uses a firearm”) or subdivision (c)(23) (“any felony in which the defendant personally used a dangerous or deadly weapon”). (*People v. Golde* (2008) 163 Cal.App.4th 101, 111-112.) A violation of section 246.3 would qualify as a violent felony if the defendant was found to have used a firearm as provided in section 667.5, subdivision (c)(8). “It is possible to be convicted of grossly negligent discharge of a firearm under section 246.3 without personally using a firearm, e.g., as an aider and abettor.” (*People v. Golde, supra*, 163 Cal.App.4th at p. 112.)

“A guilty plea admits every element of the crime charged. [Citation.]” (*People v. Thomas* (1986) 41 Cal.3d 837, 844, fn. 6.) “Admissions of enhancements are subject to the same principles as guilty pleas.” (*People v. Lobaugh* (1987) 188 Cal.App.3d 780, 785, citing *People v. Jackson* (1985) 37 Cal.3d 826, 836.) In *People v. Thomas, supra*, 41 Cal.3d 837, the trial court asked defendant, as to four prior convictions, if he admitted that he had been convicted of a “‘serious felony, burglary, on charges brought and separately tried within the meaning of sections 667 and 1192.7 of the Penal Code.’” (*Id.* at pp. 841-842.) Defendant responded, “‘Yes, I do.’” (*Id.* at p. 842.) On appeal, the defendant contended “his admission of the prior convictions was insufficient because he did not specially admit that his prior burglaries involved entry into a residence” which would have rendered the prior convictions serious felonies. (*Id.* at p. 842.) The California Supreme Court rejected the defendant’s contention, concluding that the

“defendant’s admissions that he was previously convicted on four separate occasions of burglary, and that such burglaries were ‘serious felonies’ within the meaning of sections 667 and 1192.7, are sufficient under *Jackson* [*People v. Jackson* (1985) 37 Cal.3d 826] to establish that allegation.” (*Id.* at p. 845; see also *People v. French* (2008) 43 Cal.4th 36, 50 [“*Thomas* establishes that a defendant’s admission of an alleged enhancement is valid even if it does not include specific admissions of every factual element required to establish the enhancement”].)

In *People v. Golde*, *supra*, 163 Cal.App.4th 101, the information alleged that the defendant had been convicted of violating section 246.3 in 1990, a serious felony under sections 667 and 1170.12. (*Id.* at p. 105.) At the time for the bifurcated trial on the prior conviction allegation, defense counsel represented to the trial court that “there would be an admission to the priors and we’re not challenging those so that’s what we are prepared to do.” (*Id.* at p. 111.) The trial court asked the defendant “is it correct that you acknowledge the prior conviction from June 12th, 1990?” (*Ibid.*) The defendant responded, “Yes.” (*Ibid.*) On appeal, the defendant contended there was insufficient evidence for the trial court to conclude that his prior 1990 conviction for violating section 246.3 was a serious felony under sections 667 and 1170.12. (*Id.* at p. 110.) The court of appeal agreed, observing that “defendant himself admitted only the ‘prior conviction.’ He did not admit the enhancement allegation. He did not admit the prior conviction was a serious felony. He did not admit he personally discharged the firearm at issue in the 1990 conviction. Even if defense counsel’s statements could bind defendant, which they cannot (§ 1018 [every plea shall be entered by the defendant himself]), defense counsel merely said defendant was admitting the ‘prior[],’ not the enhancement allegation.” (*Id.* at p. 113.) The court of appeal further noted that, “[t]he documents submitted by the prosecution did not show defendant personally discharged the firearm.” (*Ibid.*)

In this case, the information alleges, “It is further alleged pursuant to Penal Code sections 1170.12(a) through (d) and 667(b) through (i) as to count(s) 1, 2, 3 and 4 that said defendant(s), FELIX RAMIREZ RUIZ, has suffered the following prior conviction of a serious or violent felony or juvenile adjudication” The information identifies

defendant's November 15, 1990 conviction for violating section 246.3 in case number KA005390 as the serious or violent felony. The information continues, "It is further alleged as to count(s) 1, 2, and 3 pursuant to Penal Code section 667(a)(1) that the defendant(s), FELIX RAMIREZ RUIZ, has suffered the following prior conviction(s) of a serious felony" The information identifies defendant's November 15, 1990 conviction for violating section 246.3 in case number KA005390 as the serious felony.

In admitting the prior conviction allegations pursuant to section 667, subdivision (a) and section 1170.12, subdivisions (a) through (d), defendant did not admit that he had used a firearm within the meaning of section 667.5, subdivision (c)(8) or that he had personally used a firearm within the meaning of section 1192.7, subdivision (c)(8) or subdivision (c)(23). Nor did defendant explicitly admit that the alleged prior conviction in case number KA005390 was a serious or violent felony. But defendant admitted that "pursuant to Penal Code section 667(a)(1)" and "pursuant to 1170.12(a) through (d)" he was convicted of violating section 246.3 on November 15, 1990 in case number KA005390.

Because defendant did not explicitly admit that his conviction in case number KA005390 was a "serious felony within the meaning of sections 667 and 1192.7," his admission does not mirror the admission in *People v. Thomas, supra*, 41 Cal.3d 837. Nevertheless, defendant admitted that he suffered the prior conviction "pursuant" to section 667, subdivision (a)(1) and section 1170.12, subdivisions (a) through (d). Such an admission is sufficiently close to the admission in *People v. Thomas* to bring it within the holding of that case. Unlike the defendant in *People v. Golde, supra*, 163 Cal.App.4th 101, who merely admitted suffering a certain prior conviction, here, defendant admitted the prior conviction *pursuant* to section 667, subdivision (a) and section 1170.12, subdivisions (a) through (d).

Defendant's admission that his prior conviction was pursuant to specified statutes appears to attribute to the defendant knowledge of Penal Code sentencing provisions. This may be so, but it was defense counsel's responsibility to inform defendant of these provisions and to advise him with respect to any judicial admission. To the extent, if at

all, defendant may assert that defense counsel did not provide the necessary information or advice, the appropriate way for defendant to raise this issue is in a petition for writ of habeas corpus. (*People v. Thomas, supra*, 41 Cal.3d at pp. 843-844.)

II. Sufficient Evidence Supports Defendant's Four Section 667.5, Subdivision (b) Admissions

Defendant contends that there is insufficient evidence to support his four section 667.5, subdivision (b) admissions because the prosecution failed to establish all of the elements of section 667.5, subdivision (b) in taking defendant's plea. We disagree.

"Imposition of a sentence enhancement under Penal Code section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) "Due process requires the prosecution to shoulder the burden of proving each element of a sentence enhancement beyond a reasonable doubt." (*Id.* at p. 566.) Sufficient evidence of a qualifying prior conviction under section 667.5, subdivision (b) is present when the information alleges all of the elements of section 667.5, subdivision (b) and the defendant admits that he suffered the prior conviction. (*People v. Cardenas* (1987) 192 Cal.App.3d 51, 61 ["admission of prior convictions where the charging information specifically alleges the convictions resulted in prior separate prison terms is deemed an admission such prison terms were separately served"].)

In this case, the information alleges that defendant suffered four prior convictions "and that a term was served as described in Penal Code section 667.5 for said offense(s), and that the defendant did not remain free of prison custody for, and did commit an offense resulting in a felony convictions during, a period of five years subsequent to the conclusion of *said term*." (Italics added.) Defendant contends that the italicized part of the section 667.5, subdivision (b) allegation in the information refers to only one term and, thus, not four separate terms, and that the record is otherwise insufficient to show

that he served separate prison terms for each of his four prior convictions. Defendant also contends that the record fails to show that he did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. The record sufficiently shows that defendant served four separate prison terms and that he failed to remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction.

When defendant indicated to the trial court that he wanted to enter a plea, the trial court advised him that “four different state prison priors” had been alleged and that he would have to “admit all four of the state prison priors.” When the prosecutor first advised defendant of the charges and allegations against him prior to taking his plea, the prosecutor advised him that it was alleged that “on four separate occasions pursuant to Penal Code section 667.5(b) that [he] went to state prison four times.” When the prosecutor again advised defendant of the charges and allegations against him after defendant’s interpreter translated the plea form, the prosecutor advised defendant in less specific language that it was alleged that he “suffered prior convictions pursuant to Penal Code section 667.5(b). It means you went to prison in the past.” The plea form advised defendant that “4 priors” were alleged under section 667.5, subdivision (b).

In taking defendant’s plea, the prosecutor stated, “And to the allegations pursuant to Penal Code section 667.5(b), a violation of Penal Code section – same case, 246.3 in case KA005390; and also in case number KA023067 conviction date of September 19th, 1994, a violation of Penal Code section 12021(a)(1); in case number KA053615 conviction date of September 12th, 2001, a violation of Penal Code section 487(a); and finally case KA068105 conviction date of February 7, 2005, a violation of Penal Code section 666. All those charges are listed as allegations pursuant to Penal Code section 667.5(b). [¶] Do you admit or deny that you sustained those prior convictions, sir?” Defendant responded, “Admit it.”

The information, plea form, and advisements from the trial court and the prosecutor concerning the four section 667.5, subdivision (b) allegations amply informed defendant that it was alleged that he served a separate prison term for each of the four

alleged convictions. Accordingly, we deem defendant's admission that he suffered the four prior prison terms an admission that those prison terms were served separately. (*People v. Cardenas, supra*, 192 Cal.App.3d at p. 61.)

Defendant's construction of the words "said term" in the information's section 667.5, subdivision (b) allegation as referring to a single prison term is unreasonable in the context of the whole allegation and plainly refers to a term served as to each conviction. The information likewise plainly alleges the failure to remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. Defendant admitted the allegation and, consequently, the failure to satisfy the five-year "washout" period. (See *People v. Cardenas, supra*, 192 Cal.App.3d at p. 61.) We perceive no infirmity as to this part of the section 667.5, subdivision (b) allegation.

III. The Record Fails To Disclose That The Trial Court Knew It Had Discretion To Strike Any Of Defendant's Section 667.5, Subdivision (b) Enhancements

Defendant contends that we must remand this case to the trial court for resentencing because the trial court erroneously stated that it was required to impose one-year terms for three of the four prior convictions defendant allegedly suffered within the meaning of section 667.5, subdivision (b). Defendant contends that the trial court had the discretion to impose or strike those terms. We agree.

The trial court imposed four one-year terms pursuant to section 667.5, subdivision (b). The trial court stayed one of those one-year terms because the same conviction served as the basis for the section 667, subdivision (a)(1) five-year term. As to the three remaining one-year terms, the trial court stated, "The court is required to impose the other three priors under 667.5(b)." The trial court's statement, on its face, is susceptible to no interpretation other than that it was without discretion to strike any of the one-year terms under section 667.5, subdivision (b).

Respondent rightly does not contend that the trial court was without discretion to strike the section 667.5, subdivision (b) terms. (*People v. Bradley* (1998) 64 Cal.App.4th 386, 391.) Instead, respondent contends that the record, read in context, demonstrates

that the trial court was aware of its discretion to strike the one-year terms under section 667.5, subdivision (b). Respondent contends that because the prosecutor urged the trial court to strike the section 667.5, subdivision (b) enhancements the trial court understood its option of striking or imposing the enhancements. As respondent notes, however, the trial court did not respond to the prosecutor's suggestion. From its silence, the trial court reasonably cannot be viewed as having understood its discretion to strike the section 667.5, subdivision (b) enhancements.

Respondent also contends that the trial court, in imposing the section 667, subdivision (a)(1) enhancement stated, "That's mandatory. That's shall." and did not use the same language in imposing the section 667.5, subdivision (b) enhancements. Respondent is correct that the trial court did not use the words "mandatory" or "shall" – it used the word "required." In the context of the proceedings, any difference among those words is not significant.

IV. The Trial Court Erred In Imposing Concurrent Terms Of One-Third Of The Middle Term On Two Of Defendant's Second Degree Robbery Convictions

For two of defendant's second degree robbery convictions the trial court imposed concurrent two-year terms consisting of one-third of the middle term of three years (§ 213, subd. (a)(2)) doubled, apparently pursuant to the Three Strikes law (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)). We asked the parties to submit supplemental briefing addressing the issue of whether the trial court erred in imposing concurrent terms of one-third of the middle term rather than full terms. The parties agree that the trial court erred.

"Because concurrent terms are not part of the principal and subordinate term computation under section 1170.1, subdivision (a), they are imposed at the full base term, not according to the one-third middle term formula, even though they are served at the same time." (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1156, fn. 3; *People v. Matthews* (1999) 70 Cal.App.4th 164, 169 & fn. 4.) Accordingly, the trial court erred in imposing the concurrent two years terms.

V. The Trial Court Improperly Stayed Imposition Of One Of Defendant's Section 667.5, Subdivision (b) Terms

Defendant contends that the trial court erred in staying imposition of the one-year term under section 667.5, subdivision (b) for the prior conviction (the violation of section 246.3 in case number KA005390) that also served as the basis for the five-year term under section 667, subdivision (a)(1). Respondent concedes the error. Respondent's concession is well taken; the trial court should have struck the one-year term under section 667.5, subdivision (b) in light of the trial court's imposition of the five-year term under section 667, subdivision (a)(1). (*People v. Jones* (1993) 5 Cal.4th 1142, 1150 ["when multiple statutory enhancement provisions are available for the same prior offense, one of which is a section 667 enhancement, the greatest enhancement, but only that one, will apply"].)

DISPOSITION

The case is remanded for resentencing in a manner that is consistent with this opinion. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.